

THE HONORABLE PARIS K. KALLAS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ZANGO, INC.,

Plaintiff,

v.

KASPERSKY LAB, INC.,

Defendant.

No. 07-2-16532-1 SEA

DECLARATION OF STEVE FOGG

Steve Fogg states and declares as follows:

1. I am an attorney representing plaintiff Zango, Inc. ("Zango") in the above captioned matter. I have personal knowledge of the matters stated herein and I am competent to testify to these matters.

2. On Thursday, May 24, 2007 at approximately 8 p.m., I provided notice via email to two executives of Kaspersky Lab, USA of Zango's intention to move for a temporary restraining order in the ex parte department of King County Superior Court the following afternoon, Friday, May 25.

3. A preliminary injunction hearing before the Honorable Judge Paris K. Pallas is scheduled for June 8, 2007 at 9 a.m.

DECLARATION OF STEVE FOGG - 1

CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP  
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Seattle, Washington 98154-1051  
Tel (206) 625-8600  
Fax (206) 625-0900

COPY

1           4.       Attached hereto as Exhibit A is a true and correct copy of the Complaint in this  
2 matter, filed on May 22, 2007.

3           I declare under penalty of perjury under the laws of the State of Washington that the  
4 foregoing is true and correct.

5           DATED this 24th day of May, 2007 at Seattle, Washington.

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10 Steve Fogg  
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DECLARATION OF STEVE FOGG – 2

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**EXHIBIT A**

## SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ZANGO, INC.,

Plaintiff,

v.

PC TOOLS PTY, LTD.,

Defendant.

No.

COMPLAINT

I. INTRODUCTION

Plaintiff Zango, Inc. ("Zango") is a Bellevue-based company that provides content to its customers via the Internet. On May 11, 2007, Zango learned that its software – which has been consensually installed by millions of users – has come under surreptitious attack by a "scanning application" marketed by defendant PC Tools Pty Ltd. ("PC Tools"). Once installed on a user's computer, PC Tools' scanning application – known as "Spyware Doctor Starter Edition" – libels and destroys Zango's software programs, eliminating Zango's ability to engage in the business relationship it has developed with its existing customers and to foster that relationship with new customers. Spyware Doctor provides the computer user with no specific warning that Zango's software application will be deleted; instead, Zango's software simply vanishes from the user's computer, leaving Zango with no means of contacting or communicating with its customers.

COMPLAINT – I

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COPY

1 Zango has also learned that since March 29, 2007, Spyware Doctor Starter Edition has  
2 been distributed to millions of computer users as part of a "Google Pack" of software tools  
3 bundled together and marketed by Google. As a result of Spyware Doctor's widespread  
4 distribution, Zango has suffered irreparable harm to its business model and reputation that  
5 continues day by day. In order to combat this attack, Zango files this complaint to seek  
6 immediate judicial relief, for without quick intervention by this court, Zango will continue to  
7 suffer harm that cannot adequately be compensated at law.

## 8 **II. IDENTITY OF PARTIES**

9 1. Plaintiff Zango, Inc. ("Zango") is a corporation organized under the laws of the  
10 state of Washington. Zango is based in Bellevue, Washington.

11 2. Defendant PC Tools Pty Ltd ("PC Tools") is a privately owned company based  
12 in Australia. PC Tools maintains offices in San Francisco, California and in Australia.

## 13 **III. STATEMENT OF JURISDICTION AND VENUE**

14 3. This Court has jurisdiction pursuant to RCW 4.28.185.

15 4. Venue is proper in this Court pursuant to RCW 4.12.020.

## 16 **IV. FACTUAL BACKGROUND**

17 5. Zango is an online media company providing consumers free access to a large  
18 catalog of online videos, games, music, tools and utilities. Zango's products are offered to  
19 customers free of charge and are sponsored by advertising that customers agree to view as a  
20 condition of using the products. Zango also offers a premium version of its software that  
21 gives consumers access to Zango's content catalog without having to agree to see advertising.

22 6. Zango's proprietary software displays advertisements (to all non-premium  
23 users) while Zango customers are browsing or searching the Internet online. Zango software  
24 is designed to locate products and services that are of interest to Zango customers. It does this  
25 by recognizing keywords from customers' Internet browser and displaying relevant

1 advertisers' websites for matching products and services. Zango's software never collects the  
2 personal identifying information of its users.

3 7. Zango takes extensive precautions to ensure that every Zango customer  
4 affirmatively and knowingly consents to download, installation and continued usage of Zango  
5 software. Before installing Zango programs, customers are provided with plain language  
6 disclosures describing Zango's software and how it works, as well as a complete End User  
7 License Agreement and a link to Zango's Privacy Policy. Every customer who downloads  
8 Zango software programs receives a post-installation confirmation message, complete with a  
9 link for more information, including uninstall instructions. Within 72 hours of downloading  
10 Zango software, customers receive a reminder that they have installed Zango programs, which  
11 includes information about how the software works along with uninstall information. Ninety  
12 days after install, and every 90 days after that, Zango sends customers an additional reminder  
13 that they have installed Zango software, including information as to how the programs work  
14 and uninstall instructions. In addition, upon download, Zango programs provide a system tray  
15 icon from which the customer can access program information, customer support and  
16 uninstall instructions. Customers can access further information about Zango programs  
17 through the "Start / All Program" menu, including direct links to customer support and  
18 uninstall instructions. Advertisements delivered by Zango software are labeled as coming  
19 from Zango programs and provide a link to further program information and uninstall  
20 instructions. And, uninstallation of Zango programs can always be done through the  
21 Add/Remove Programs function.

22 8. On information and belief, defendant PC Tools is in the business of developing  
23 and marketing various computer protection and security software programs. One such  
24 program is "Spyware Doctor," which PC Tools proclaims provides "spyware protection to  
25 secure Windows® PCs against privacy and tracking threats."

1           9.     On information and belief, on March 29, 2007, Google, Inc., an Internet  
2 company, revised its "Google Pack" software package to include a product from PC Tools  
3 called "Spyware Doctor Starter Edition" ("Starter Edition"). The default grouping of software  
4 in the "Google Pack" includes PC Tools' Starter Edition, which means that each and every  
5 one of likely millions of Google Packs distributed since March 29 and installed around the  
6 world by consumers – the exact number, on information and belief, presumably known by  
7 PC Tools – includes this Starter Edition component.

8           10.    On Friday, May 11, Zango learned that Starter Edition Version 5.0.0.169  
9 (Database: 5.07280) is disabling Zango installations to the point that existing, consensually  
10 installed Zango software already resident on the consumer's computer no longer functions.  
11 Further testing revealed that while the Starter Edition software prevents the display of  
12 advertisements from Zango on behalf of Zango's advertising partners (which is the primary  
13 source of Zango revenue), some existing Zango customers nonetheless are still able to access  
14 the content in Zango's catalog (i.e., the movies, games, screensavers, and the like). Starter  
15 Edition software damages the Zango application immediately upon installation, without  
16 giving any specific notice whatsoever to Zango customers or providing any opportunity for  
17 Zango customers to consent or intervene.

18           11.    Zango has also learned that consumers downloading the Google Pack after  
19 March 29 who did not already have Zango's software installed are now wholly unable to  
20 install Zango software, thereby eliminating Google Pack users as potential Zango customers.  
21 Starter Edition provides no opportunity for users who wish to download and install Zango to  
22 ignore, allow, or otherwise stop Starter Edition from blocking the installation of Zango.

23           12.    Zango has also learned that Starter Edition identifies Zango software as an  
24 "Infection" engaged in a "Malicious Action" that represents an "Elevated Risk." PC Tools is  
25 well aware that these characterizations are completely false. Indeed, on March 28, 2007,

1 Jim Meem, the director of PC Tools' Malware Research Centre, admitted in an e-mail sent to  
2 Zango that "[w]e [PC Tools] have concluded that Seekmo [one of Zango's proprietary  
3 software brands] is not malicious."

4 13. Since learning of Starter Edition's attack on Zango software on May 11, Zango  
5 has repeatedly contacted senior PC Tools employees to demand the immediate removal of  
6 Zango products from the Starter Edition detection database. On May 14, Zango repeated its  
7 demand in a cease-and-desist letter sent to PC Tools' senior executive staff, including its  
8 general counsel. To date, PC Tools has not complied with Zango's request, thereby causing  
9 Zango continuing and irreparable damage both to its revenue and its reputation in the  
10 marketplace.

11 14. PC Tools' actions have resulted in significant damage to Zango's reputation,  
12 customer base and business model. That damage includes: disabling Zango software  
13 purchased by customers who have elected to install a premium version of that software (retail  
14 price \$29.99) in order to access free content without having to see ads; precluding any future  
15 such customers from being able to install that premium software; destroying Zango's ability  
16 to recoup, through both paid and ad-supported software versions, the cost of acquiring and  
17 licensing for distribution the extensive content in Zango's content catalog (estimated value:  
18 several million dollars); chilling Zango's ability to partner with new content providers and  
19 distribution channels, thereby hindering Zango's expansion plans and devaluing its  
20 investment in offices, operations, infrastructure, and employees in Washington state, North  
21 America, and other parts of the world; and in other ways not yet realized or fully understood.  
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**V. CLAIMS FOR RELIEF**

**First Cause of Action:**  
**Injunctive Relief**

15. Zango incorporates and realleges the allegations contained in Paragraphs 1 through 14 above.

16. Zango has a clear legal or equitable right and a well-grounded fear of immediate invasion of that right. PC Tools' conduct has caused injury and will continue to cause injury to Zango, and the relative equities of the parties favor granting injunctive relief.

**Second Cause of Action:**  
**Tortious Interference with Contractual Rights or Business Expectancy**

17. Zango incorporates and realleges the allegations contained in Paragraphs 1 through 16 above.

18. PC Tools has purposefully and knowingly interfered with Zango's business relationships, both existing and contemplated.

19. As a result of PC Tools' conduct, Zango has been harmed. Zango is therefore entitled to injunctive relief and to all damages proven at trial.

**Third Cause of Action:**  
**Violation of Washington Consumer Protection Act**

20. Zango incorporates and realleges the allegations contained in Paragraphs 1 through 19 above.

21. PC Tools, through its conduct, has acted unfairly and deceptively in violation of RCW 19.86.010 et seq.

22. PC Tools' conduct occurred in trade and commerce and caused Zango substantial damage.

23. The public interest has been affected by PC Tools' conduct.

1           24. Zango is entitled to treble damages and to injunctive relief, and to recovery of  
2 its attorney fees and costs in bringing this lawsuit.

3                                   **Fourth Cause of Action:**  
4                                   **Trade Libel**

5           25. Zango incorporates and realleges the allegations contained in Paragraphs 1  
6 through 24 above.

7           26. PC Tools, through its conduct, has made false and disparaging statements  
8 about Zango's products.

9           27. PC Tools publishes its false and disparaging statements to users of Starter  
10 Edition.

11           28. As a result of PC Tools' conduct, Zango has been harmed, including suffering  
12 injury to its reputation and ongoing financial injury. Zango is therefore entitled to injunctive  
13 relief and to all damages proven at trial.

14                                   **Fifth Cause of Action:**  
15                                   **Unjust Enrichment**

16           29. Zango incorporates and realleges the allegations contained in Paragraphs 1  
17 through 28 above.

18           30. PC Tools, through its conduct, has benefited from its disparagement and  
19 disabling of Zango's products.

20           31. It would be inequitable for PC Tools to retain the benefit of its wrongful  
21 actions. PC Tools should be required to account for, and disgorge, all revenues it received as  
22 a result of its wrongful actions toward Zango.

23                                   **VI. RELIEF REQUESTED**

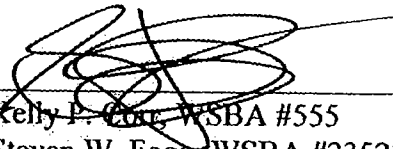
24           WHEREFORE, plaintiff prays for relief as follows:

25           A. For all damages as may be proven at trial (and which are estimated to be no  
less than \$35 million);

- 1 B. For treble damages pursuant to RCW 19.86.090;  
2 C. For injunctive relief;  
3 D. For attorneys' fees and costs; and  
4 E. For such other relief as the Court may deem just and equitable.  
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6 DATED this 15<sup>th</sup> day of May, 2007.

7 CORR CRONIN MICHELSON  
8 BAUMGARDNER & PREECE LLP  
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10   
11 Kelly L. Corr, WSBA #555  
12 Steven W. Fogg, WSBA #23528  
13 Attorneys for Plaintiff  
14 Zango, Inc.  
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